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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re M.L., et al.,
Persons Coming Under the Juvenile Court
Law.

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,,

v.

G.L.,

Defendant and Appellant.

B172714

(Los Angeles County
Super. Ct. No. CK34090)

Appeal from an order of the Superior Court of Los Angeles County.

S. Patricia Spear, Judge. Reversed and remanded.

Lloyd W. Pellman, County Counsel, Judith A. Luby, Senior Deputy County
Counsel for Plaintiff and Respondent.

No appearance for Minor Children.

Milissa A. Chaitin, under appointment by the Court of Appeal, for Defendant and
Appellant.

G.L., mother of dependent children A.J. (3-93), M.L. (5-98), D.L. (5-98), R.L. (7-00), and D.L. (7-00) (“Mother”), appeals from a November 19, 2003 order that denied her a hearing on her Welfare and Institutions Code section 388 petition. The hearing was denied on the ground that Mother’s proposed amendment of a prior order would not be in the children’s best interest. Her appointed appellate attorney filed a “*Sade C.*” letter with this court (*In re Sade C.* (1996) 13 Cal.4th 952), and thereafter Mother filed a letter brief in support of her appeal.

This is Mother’s second dependency case. The previous return of her children to her did not succeed. After the children were taken from her this second time, she enrolled in a highly structured, long term, live-in drug treatment program that has a remarkable variety of classes for its participants. She was there for approximately 18 months and successfully completed the program, gaining many positive written reports about her. She then enrolled in the after care program and is living on her own in an apartment. Besides having substance abuse problems, she also entered the program with mental health issues. A report written by the Department of Children and Family Services (the Department) states the dependency court never ordered reunification services for Mother in this second case. Thus, apparently her commendable achievements are the result of her own strong determination to reunite with her children.

To receive a hearing on a section 388 petition, the parent need only make a prima facie showing that (1) there has been a change of circumstances or new evidence, and (2)

modifying the subject prior order would be in the child's best interest. The petition is to be liberally construed in favor of its sufficiency.

As noted, the order summarily denying Mother's section 388 petition states it was denied because Mother had not demonstrated how her requested modifications would promote the best interests of the children. (She requested reunification services, modification of visitation, and a home of parent order.) Cases, however, have held that a child's desire to live with his or her parent can be powerful evidence that it is in the child's best interest to do so, and here, Mother's presentation to the trial court included her representation that her children cry when she leaves them in Sacramento (where they are living with a family member) when her monthly visits come to an end, and they tell her they want to come home and live with her.. Thus, there was a prima facie "best interest" showing.

We are therefore left with the conclusion that the trial court abused its discretion when it denied a hearing on Mother's November 2003 section 388 petition. We will reverse the order and remand this case so that such a hearing can be held in accordance with the directives expressed herein.

BACKGROUND OF THE CASE

1. Origins of the Current Dependency Case

The three oldest of the five dependent minors were in the dependency system from 1998 to on or about June 4, 2001. Another dependency petition was filed in January 2002 by the Department on behalf of all five children. The petition was sustained in

April of that year and the minors were declared dependents the following month.¹

Family reunification services were not ordered for Mother. The court's permanent plan was long term foster care for the children.

2. Mother's January 2003 and March 2003 Section 388 Petitions

Mother has filed several section 388 petitions in this case. Her January 2003 petition for family reunification was summarily denied because the court did not find the best interests of the children would be promoted by such reunification. In her March 2003 section 388 petition, she requested family reunification services for herself, weekend overnight visits, and a home of parent placement in her home. A May 5, 2003 hearing was set for the purpose of addressing visitation only.

Mother's two sets of twins were living in Sacramento with their maternal great aunt, and had been there since September 2002. The minor A.J. was residing with her foster mother in Los Angeles, since April 2002. The Department reported that all five minors were adjusting well in their placements. The maternal great aunt indicated she would agree to becoming the legal guarding of the children in her care. A.J.'s foster mother indicated to the Department she would continue to foster the minor.

The May 5 hearing on the issue of Mother's request for visitation was continued to June 4. The court granted Mother monitored visits with the four children in Sacramento, but ordered she could not reside in their home while she was there, and could not visit

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The five dependent children were found to be children coming within subdivisions (a), (b), (g), (i), and (j) of section 300.

with her other child, A.J., who would be visiting the twins for the summer. Mother had monitored visitation with A.J. about two weeks prior to the June 4 hearing and the minor was upset by it. Mother's other requests (home of mother placement and family reunification services for her) were denied.

A review of the permanent plan was held on July 23, 2003. The Department's recommendation was that all five children be adopted by their maternal great aunt in Sacramento. According to the Department's report, the great aunt stated she had only planned on a legal guardianship of the four younger children because she was not aware she could receive post-adoption financial and medical assistance for the children, but she preferred the most stable plan for them. She indicated she would also adopt the oldest child, A.J., if the minor liked staying with her that summer and wanted to continue living with her. All five children were reported to be doing well in their respective placements and their physical, medical and emotional needs were being met.

The Department's reports for the July 23, 2003 permanent plan review hearing show that Mother was enrolled in the "Shields for Families, Inc." drug treatment program, and was residing in its Eden home facility for adults in Los Angeles. A January 21, 2003 letter from the program, which Mother filed with her January and April section 388 petitions, shows she enrolled in the Eden Family Preservation Dual Diagnosis Program on September 3, 2002. She was required to attend the program's various services five days a week, seven hours a day, for nine to twelve months. Services include individual, family and group therapy; psychiatric evaluations and relapse prevention; anger management; educational and vocational services; health and nutrition; HIV/AIDS

education; family reunification; parenting—mommy, daddy & me; discharge planning; transportation assistance; 24-hour hotline-crisis intervention; and weekly random urinalysis testing. Mother stated in her January 23, 2003 letter to the court that she remains clean and sober.

At the July 23, 2003 post-permanent plan review hearing, the court ordered that its previous order for Mother's visitation in Sacramento would remain in effect so long as she continued to not have contact with the minor A.J. while she was there. A section 366.26 selection and implementation hearing for a finalized permanent plan, which was also set for July 23, was continued to November 19, and again into 2004, because of insufficient notice.

3. Mother's November 18, 2003 Section 388 Petition

In the meantime, on November 18, 2003, Mother filed the section 388 petition that is the subject of this appeal. She again requested that the current orders be amended to give her family reunification services, weekend visits (apparently she meant visits in Los Angeles), and a home of parent placement with her. As grounds for her requested modification, Mother stated she had been visiting with the children in Sacramento, she maintains contact with them by telephone, she was progressing at Shields for Families, and she continued to test (apparently meaning she continued to test negative).

Mother submitted substantial documents with her petition. These included a voucher from the City of Los Angeles for subsidized housing for a two-bedroom unit, and a report from Shields for Families which states Mother was due to complete her program in Eden by February 2004. A Shields report, dated July 22, 2003, states Mother

enrolled in that program with a history of substance abuse and mental health issues. She was reported to have set reasonable goals for herself, processed early childhood issues, addressed her current issues, including anger management, depression and grief/loss around her children, and was receptive to support and feedback when offered to her. She continued to experience moderate symptoms of depression, which she associated with her separation from her children and her dwindling financial resources. “Her group sessions address her history of domestic violence, parenting classes, family reunification, HIV, and the management of symptoms associated with mental illness,” and her participation in those sessions was satisfactory. An October 29, 2003 report states Mother demonstrated an understanding of the program materials and was able to apply them to her own life, and her “openness and honesty about her own life and goals continues to be her strong point.” She was observed to be a very loving and positive person, who demonstrates a strong interest in parenting her children and looks forward to reunification with them, if the dependency court permits reunification.

A November 6, 2003 progress report from Shields for the period June 18 to November 6, 2003 states Mother had no unexcused absences from the program. She was tested 19 times for drugs and none of the tests were positive. She was reported to have a positive attitude about her monthly visits with her children in Sacramento, she remained willing to address her anger issues in group and individual sessions, she was willing to attend treatment during her entire pregnancy (the record indicates Mother gave birth to another child in October 2003), and she took the initiative to return to the program after she delivered her baby.

Mother also wrote letters to the court.² In one letter, she recounted her first visit with the children in Sacramento, which occurred on August 23, 2003, and which she described as the best 9 hours she had the whole year. Mother stated she calls her children every other day (she presented telephone bills for July—October 2003 but there is no way to verify which calls are to her children), and she presented evidence (Greyhound Bus documents) of her visits to Sacramento in August, September, October and November 2003.³ Mother asserted the social worker was not presenting a true picture of her to the court respecting the progress Mother has made. She told the court her children cry when she leaves Sacramento to return to Los Angeles and they tell her they want to come home. She tells them she is working on it. She states her family in Sacramento is not trying to take the children from her permanently; her aunt told her that she never told the Department she wants to adopt the children, and the Department has threatened to split the children if the aunt will not adopt them. Mother reported the aunt would agree to long term foster care until Mother could complete her 18-month Shields for Families program.

An October 23, 2003 letter from Shields for Families states Mother was involved in the child development center since September 2002, participating in all the parenting

² For Mother's future reference, we observe that her handwriting on her petitions and in her letters is often difficult to read.

³ At oral argument in this appeal, Mother indicated that due to circumstances in this case, she has not been able to visit with her children in Sacramento for several months. She will have an opportunity to fully explain the specifics of that matter at the section 388 hearing upon remand of this case back to the trial court.

groups, asking questions about spending quality time with children, positive communication with her children, and positive discipline, and she is described as very open to suggestions and appearing to take the sound advice. Her treatment time includes interacting in the child development center, where she interacts with children of all ages and is able to use age appropriate activities and exhibit a positive attitude. An October 30, 2003 letter from Shields states Mother had moved on and was residing in the Shields' transitional living facility, and she had received a section 8 voucher.

Mother presented certificates from Shields, including ones for successfully completing a relapse prevention program (August 2003), participating in a focus group facilitation training (November 2002), participating in the behavior change and skills building project of Charles R. Drew University of Medicine and Science (May 2003), completing 34 hours of instruction in the parenting and family life education program (May 2003), completing the mommy, daddy and me program (December 2002), completing the family reunification program (August 2003), completing the anger management program (October 2003), completing the drug and alcohol education program (July 2003), and completing 9 hours of module I of symptom management to understand mental illness and learn new ways of increasing and maintaining positive mental health (August 2003).

According to a section 366.26 report filed with the court on November 19, 2003 by the Department, Mother's dependent child who had been living in foster care in Los Angeles was living in Sacramento and had begun attending school there. The maternal great aunt/foster parent was reported to show "a great interest" in adopting all five

children; however the report also states the aunt desires to become the children's legal guardian. According to the report, the social worker "attempted contact [Mother] numerous periods, but received very little response from her." The social worker reported Mother was currently prescribed antidepressant and antipsychotic drugs by the Shields psychiatrist, and the social worker opined that due to such medication and mother's "mental health status," it was uncertain how Mother would respond to having six children to care for, and the children's being in Mother's care could be detrimental to their best interests and to Mother's own mental health. The Department did not submit a report or statement from an expert on such matters.

As noted in the introductory portion of this opinion, there was no hearing on Mother's November 18 section 388 petition. It was summarily denied on the grounds she had not demonstrated how her requested modifications would promote the best interests of the children.

4. Mother's Appeal

After Mother filed this timely appeal, counsel was appointed for her. Counsel notified this court, under *In re Sade C.*, *supra*, 13 Cal.4th 952, that she was not able to file a brief on Mother's behalf. We notified Mother of her right to file papers with this court to present contentions and arguments regarding her appeal, and she has done so.

In her presentation, Mother stated she successfully completed the lengthy, multi-faceted program at Shields for Families, and she included a certificate from Shields dated February 27, 2004, to verify her successful completion. She explained that she has been attending a weekly Shields aftercare program, and she presented documentation for

attendance beginning in late 2003 through mid-May 2004. Mother explained that by filing the section 388 petition, she is asking for a second chance to be a good parent for her children. She stated she has been on her own, living in her own home, for about six months, and can provide food, clothing and shelter for all of her children. She added she continues to visit her children in Sacramento, and the children keep asking when they can come home, however that appears to be at odds with her representation at oral argument. (See fn. 3, *ante*.)

DISCUSSION

1. The Standard of Review

Our standard of review in this appeal from the summary denial of Mother's November 2003 section 388 petition is abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) As we indicated earlier, to receive a hearing on a section 388 petition, the parent seeking modification or revocation of a prior order must make a prima facie showing. The parent must demonstrate a genuine change of circumstances or new evidence, and must demonstrate that changing or setting aside the previous order would be in the child's best interest. Without such a showing, no hearing on the parent's petition is necessary. (*Ibid.*) It is not, however, necessary for the petition to establish that the parent will probably prevail on the petition. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) From our review of the appellate record, we conclude the trial court abused its discretion when it denied a hearing on Mother's petition based on its belief Mother had not demonstrated how her requested modifications would promote the best interests of her children.

While a child's wish to be reunited with his or her parent is not determinative of the child's best interest, the wish "constitutes powerful demonstrative evidence that it would be in [the child's] best interest to allow [the child] to do so." (*In re Aljamie D.*, *supra*, 84 Cal.App.4th at p. 432; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.) Here, Mother's presentation to the trial court included her representation that when her monthly visits with her children in Sacramento were over, the children would tell her they want to come home to her. Thus, Mother presented prima facie evidence that it would be in her children's best interest to amend the prior orders to allow for expanded visitation and reunification services.⁴

⁴ In determining the best interests of a minor child, the factors that the dependency court considers will vary from case to case, but will necessarily include eliminating or controlling the problems that caused the child to be placed away from his parent in the first place. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463-464.) As noted, in the instant case, a July 2003 report from Shields for Families states Mother enrolled in that program with a history of substance abuse and mental health issues, and she continued to experience moderate symptoms of depression, which she associated with her separation from her children and dwindling financial resources.

Obviously mental health issues are not always resolved, but they can often be managed sufficiently so that a parent with such problems can successfully raise her children. Mother may need ongoing medication and counseling. Substance abuse can be a difficult thing to control and here, Mother has been at that task for nearly two years, and the latest reports in the appellate record state she remains clean.

2. Legislative Provisions for Reunification Efforts After the Permanent Planning Hearing

After a permanency planning hearing and termination of reunification services, there is a presumption that continued care of the dependent child away from the parent's home is in the child's best interest. (*In re Michael D.*, *supra*, 51 Cal.App.4th at p.1086.) "However, the presumption may be rebutted by the parent showing circumstances have changed which would warrant further consideration of reunification. [Citation.] . . . [¶] Thus, the thrust of the legislative scheme is to encourage parents to correct earlier problems so as to reunite them with their children. [Citation.] This intent would be thwarted if parents lost all ability to regain custody of their dependent minors, despite rehabilitation and despite having corrected earlier problems, if parents whose rights had not been terminated could only regain custody by proving the minors suffered harm in their current living situation. This would be contrary to the legislative goals, public policy and common sense. The Legislature has provided the 'escape mechanism' through section 388 to allow juvenile courts to consider new information, and grant petitions for modification where the parent proves by a preponderance of the evidence a change in placement to the parent's home is in the best interest of the child. [Citations.]" (*Ibid.*) Given the *Michael D.* court's analysis of the value of section 388 to both parents and children, it is clear that the Department presented unmeritorious positions at oral argument when it argued against having a section 388 hearing on the grounds that

(1) affording Mother the hearing delays a permanent plan, and (2) the children are already in a good home.⁵

3. There Was No Abuse of Discretion in Denying a Hearing on Mother's Request for a Home of Parent Order

In her petition, Mother requested reunification services, expanded visitation, and a home of parent placement in her home. Mother's previous dependency case jurisdiction was terminated in 2001 and the termination did not hold; her children came back into the system within approximately seven months. Thus, this is not the first time she has represented to the juvenile court that things are under control in her life. While it is true that Mother's reports from Shields are quite positive, and she certainly is to be *highly* commended for her willingness to make the effort day after day and month after month to improve her life and regain care of her children, it is also true that at the time she filed the subject section 388 petition, her success had been largely achieved during that period of time when she was living in the structure of program housing and constant classes. At the time the trial court was considering Mother's petition, there had not yet been sufficient time for Mother to demonstrate that she is able to succeed for a lengthy period of time outside of that highly structured environment. However, all of these matters are only factors in this dependency case, they are not insurmountable roadblocks, and indeed, it has now been eight months since the court denied the subject section 388 petition and

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At oral argument, Mother represented that her relatives in Sacramento want to send the children to Kentucky to live with paternal relatives whom the children do not know. Mother will have an opportunity at her section 388 hearing to show that further efforts at reunification with her are a better alternative for the children.

Mother will have the opportunity to show the dependency court that she remains successful in living on her own.

Because success breeds success, Mother may prove to the court that she is able to care for her children in her home on a full time basis. Nevertheless, at the time of the hearing on her November 2003 petition, the children were reported to be doing very well with their relatives in Sacramento. The trial court could reasonably conclude that it would not be in their best interest to take them out of that environment and bring them back here to Los Angeles in a home of parent placement with Mother on speculation that Mother *might* continue to do well outside of the structured environment of Shields. The dependency court had to choose between the stability of the Sacramento home, and Mother's new living situation which remained to be tested. Moreover, as we have noted, the record indicates Mother gave birth to another child in October 2003. Her ability to care for her newest child needed to be proven before she was given the task of caring for several more children full time. Thus, we find no abuse of discretion in denying her a hearing on her petition to change the long term foster care order to a home of parent order. The trial court could reasonably conclude that it would not be in the children's best interest to reunite them immediately with Mother. The fact that two courts presented with the same set of facts and the opportunity for an exercise of discretion may come to different conclusions does not necessarily mean that one abused its discretion. (*Gonzales v. Nork* (1978) 20 Cal.3d 500, 507; *Brown v. Newby* (1940) 39 Cal.App.2d 615, 618.) Nevertheless, because we are going to send this case back for a hearing on Mother's

section 388 petition, the trial court should permit Mother to amend her petition, if she chooses, to include a factual presentation of what has occurred in this case since Mother's petition was filed in November 2003. Perhaps the additional information may be sufficient to convince the trial court that a home of parent placement should be attempted.

*4. It Was an Abuse of Discretion to Deny Mother a Hearing on Her
Request for Reunification Services and Expanded Visitation*

A home of parent order was only one of the three modifications Mother requested, and we find there was an abuse of discretion in denying her a hearing on her request for reunification services and expanded visitation. This court, unfortunately, does not often see parents who put as much effort into reunifying with their children as Mother has done in this case, and she did not even have the benefit of reunification services. One wonders what she could accomplish if she were given such services now. We repeat, it is the intent of the legislative scheme that parents be *encouraged* by the juvenile court and the local children's protective agency to correct the problems that caused removal of their children, *not discouraged*. Provision of reunification services is one form of encouragement, as is expanded visitation, the very things Mother requested in her section 388 petition.

Indeed, subdivision (e) of section 366.3 provides that where the permanent plan is not a legal guardianship and jurisdiction has not been dismissed, reunification services may be provided to the parent. Subdivision (e) of section 366.3 states the court shall review the status of the child every six months and examine, among other things, "[t]he extent of progress the parents . . . have made toward alleviating or mitigating the causes

necessitating placement in foster care.” Subdivision (e) also provides that unless the rights of the parents have been permanently terminated, “the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment, be provided to the parent or parents for a period not to exceed six months.” Although the Department argued at oral argument that this case is past the reunification period, subdivision 366.3, like the above-mentioned analysis of *In re Michael D.*, *supra*, 51 Cal.App.4th at p. 1086 regarding section 388 petitions, shows that reunification between parent and child is both possible and encouraged even past the reunification period.

In re Aljamie D., *supra*, 84 Cal.App.4th 424, presented facts similar to those of the instant case in that the mother and her children had previously been through a dependency case that did not permanently resolve the mother’s drug problems, and in the second case, the mother participated in a residential drug treatment program, completed the program and parenting classes, continued to test negative in random drug tests, and the subject children wished to live with the mother. The mother filed a section 388 petition seeking a 60-day trial visit. Noting the mother’s completion of the programs, her continued clean testing, her regular visitation, and the children’s desire to reunite with her, the reviewing court ruled she was entitled to a full hearing on the petition before the dependency court held a section 366.26 selection and implementation hearing. Because

the trial court entered a guardianship order after it wrongfully denied a mother a hearing on her section 388 petition, the *Aljamie D.* court ruled both the order denying the hearing and the order for guardianship had to be reversed.

5. This Case Must Be Remanded for a Hearing on Mother's Petition

In addition to providing a hearing for Mother on her section 388 petition, the trial court should again appoint an attorney to represent her. While Mother was willing and able to litigate her appeal without the aid of an attorney, including filing *Sade C.* papers and presenting her position at oral argument, she should not be required to navigate the ins and outs of the Welfare and Institutions Code by herself when this case is remanded to the trial court.⁶

DISPOSITION

The order from which Mother has appealed is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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CROSKEY, J.

We Concur:

KLEIN, P.J.

KITCHING, J.

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We do not intend, by anything we have said in this opinion, to convey a message that the trial court should reach any particular result when it conducts the section 388 hearing. Mother is entitled to the hearing but not to a specific outcome.